IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 7374 OF 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge ?

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DEVKINANDAN K. MISHRA - Petitioner(s)
Versus
SAYAJI IRON AND ENGINEERING COMPANY PVT. LTD. & ANR. - Respondent(s)

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Appearance :
Shri Shalin Mehta for Petitioner(s).
Shri K.B. Naik for M/s. Trivedi & Gupta for Respondent(s) : 1.
None for Respondent No.2 though served.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 09/08/2007

ORAL JUDGMENT

The petitioner, being aggrieved by the award dated 7th April,

1999 passed by the learned Labour Court, Vadodara in Reference (LCV) No.650 of 1985 holding that the reference was not maintainable and that even on merits, the punishment of dismissal was not shockingly disproportionate to the alleged misconduct, is before this Court with a submission that the learned Court below erred in rejecting the reference.

2. The short facts necessary for disposal of the present Writ Application are that the order of appointment directed that the petitioner was appointed as a 'Machinist Chargehand' and he was to work himself with the boring, milling and shipping and slotting machine and was also to look after the work of operation on other machines as may be instructed from time to time. He was appointed on a consolidated salary of Rs.530/- in the grade of 530-15-600. It appears that after some time, on an inspection, the petitioner, who was to supervise the work over the machines, was found sleeping and the workmen, who were to work on the machines, had also shut down the machines and were found sleeping. The alleged incident took place on 28th March, 1985 and on the same day, on the charge that he was found sleeping in between 2:30 a.m. and 4:30 a.m., he was placed under suspension; a charge-sheet was issued and an inquiry was held and the petitioner was terminated. Being aggrieved by the termination, the petitioner made a reference to the learned Labour Court.

2.1 In the pleadings, the petitioner submitted that he was working as a supervisor, however, he was a workman and he could not have been dismissed from the services. The other party accepted the contention of the petitioner that he was a supervisor, but, however, submitted that the petitioner in dereliction of his duties was found sleeping and under the circumstances, dismissal could only be the appropriate punishment.

3. The learned Labour Court, holding that the petitioner was a supervisor, firstly held that the reference was not maintainable and even on merits, held that looking to the gravity of misconduct, the punishment of dismissal was just and proper.

4. Shri Shalin Mehta, learned Counsel for the petitioner, after taking me through the definition of the workman, as provided under Section 2(s) of the Industrial Disputes Act, 1947, submitted that every supervisor would fall under the definition of a workman except those who are drawing the salary of Rs.1,600/- or more. He submitted that in the present matter, the salary of the petitioner was Rs.1,350/- and some allowances, the details of the allowances have not come on records. Therefore, the petitioner would come within the definition of the workman. Placing reliance upon a judgement of the Supreme Court in

the matter of ***Colour-Chem Ltd. vs. A.L. Alaspurkar & Ors.***, reported in ***(1998) 3 S.C.C. 192***, it was submitted that for a single lapse, the petitioner could not be removed from the services.

5. Shri K.B. Naik, learned Counsel for the respondent-Establishment, on the other hand, submitted that the definition of the workman would clearly show that the petitioner being a supervisor would not come within the definition of the workman and the learned Court below was justified in holding that the reference was not maintainable. He also submitted that looking to the gravity of misconduct, termination was the only appropriate punishment.

6. Section 2(s) of the Industrial Disputes Act, 1947 reads as under:

> *(s) 'workman' means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person -*
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> *(i) who is subject to the Air Force Act, 1950 (45 of 1950),*

or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

From the above definition, it would be clear that any person, who is employed in any industry to do any supervisory work for hire or reward, would be deemed to be a workman, but, however, the said definition would not include any such person, who being employed in a supervisory capacity, draws wages exceeding Rs.1,600/- per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature. It is not in dispute before me that the petitioner was not functioning as a manager or was discharging managerial duties.

7. To put the case of the petitioner in the exception, the burden was upon the respondents to show that the petitioner was drawing the wages more than Rs.1,600/- per month. True it is, that the

petitioner's case was that he was drawing Rs.1,350/- and allowances, but, unfortunately, the details of the allowances have not been brought on the records. Nobody knows that the allowances were above Rs.250/- or less. If the respondents wanted to oust the jurisdiction of the learned Labour Court, then, they were required to prove that the total emoluments, including the wages, allowances, etc., were beyond Rs.1,600/- per month. The respondents having failed in discharging the burden and ousting the jurisdiction of the learned Labour Court, the learned Labour Court was not justified in holding that the petitioner was not a workman, but, was a supervisor.

8. So far as the question of punishment is concerned, in almost an identical situation, in the matter of ***Colour-Chem Limited*** (*supra*) where a supervisor was found sleeping, the Court found that the punishment of dismissal would be shockingly disproportionate and would amount to cracking a nut by the sledgehammer. The Supreme Court observed that in a welfare legislation, if a particular provision is capable of two constructions, one which furthers the policy and object of the Act and which is more beneficial to the employees, should be preferred. In the said matter, the Supreme Court observed that dismissal of the person found sleeping at the work place, would not be misconduct of such a grave nature, inviting the punishment of dismissal.

In the said matter also, the Plant-in-Charge was found sleeping at about 3:30 a.m. in the early hours of the dawn and the entire work force of 10 mazdoors and 2 operators like the respondents and the supervisor were all asleep. The facts of the present case are not similar but identical. In the said case, the Supreme Court found that the dismissal was illegal. The Court found that where the misconduct is not of a grave nature, reinstatement and continuity of service should be awarded as a rule, but, the payment of back-wages would be in the discretion of the Court.

9. Following the judgement of the Supreme Court, I direct reinstatement and continuity of the services of the present petitioner.

10. So far as the question of back-wages is concerned, after hearing the parties, I hold that the petitioner would be entitled to 30% back-wages from the date of the termination till reinstatement.

11. The petition is allowed to the extent indicated above. Rule is made absolute. No costs.

[R.S.Garg, J.]

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